IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Narendra Kumar. Versus Smt.Maya alias Nirmala.

S.B. Criminal Revision Petition No. 398/2002 against the order dated 22-5-2002 passed by the Judge, Family Court, Udaipur, in Criminal Regular Case No.448/2001.

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Date of Order: November 03, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. Shambhoo Singh, for the petitioner.
Mr. Sandeep Mehta, for the non-petitioner.

BY THE COURT:

This criminal revision petition under Section 397/401 of the Code of Criminal Procedure, 1973 (for short, "the Code" hereinafter) is directed against the order dated 22-5-2002 passed by the Judge, Family Court, Udaipur (for short, "the trial Court" hereinafter) in Criminal Regular Case No.448/2001, whereby the trial Court, on an application filed by the non-petitioner under Section 125 of the Code, granted monthly allowance of maintenance @ Rs.1000/- per month in favour of the non-petitioner and against the petitioner. Being aggrieved of the order impugned granting monthly allowance of maintenance, the petitioner has filed the instant criminal revision petition.

I have heard learned counsel for the parties. Carefully gone through the order impugned, as also the record of the trial Court.

It is contended by the learned counsel for the petitioner that though the marriage of the petitioner and non-petitioner was solemnized on 1-6-1979 according to Hindu rites but since 1988, the non-petitioner has been residing separately and it is the non-petitioner who deserted the petitioner and, therefore, she is not entitled for any maintenance. Learned counsel for the petitioner further submits that the non-petitioner earlier filed an application under Section 125 of the Code seeking monthly allowance of maintenance before the Judicial Magistrate, Doongarpur being Criminal Case No. 114/1985 and during pendency of that matter, the parties entered into a compromise vide EX.NA-1 on 25-5-1988 and as per the compromise, the petitioner has paid a sum of Rs.28,000/- to the non-petitioner and the trial Court disposed of the matter keeping in view the compromise filed by the parties vide EX.NA-2. Learned counsel further submits that the non-petitioner filed an application under Section 9 of the Hindu Marriage Act, 1955, which came to be dismissed by the Family Court, Udaipur, vide order dated 11-8-2003 and the appeal against that order, being D.B. Criminal Misc. Appeal No. 302/2004 was dismissed by this Court vide order dated 2.1.2006. Learned counsel for the

petitioner further submits that by entering into the compromise, the issue between the parties had been decided in the earlier application under Section 125 of the Code and, therefore, the principle of res judicata applies and the non-petitioner is estopped from claiming the allowance of maintenance. It is also contended by the learned counsel for the petitioner that the non-petitioner herself is an earning member as she is working in "Aanganwadi" and as such she is able to maintain herself. Learned counsel has relied on a decision of the Hon'ble Supreme Court in C.V. Rajendran & Anr. N.M. Muhammed Kunhi, 2003 (1) (SC) Civil 121, wherein the Hon'ble Apex Court held that the principle of res judicata applies as between two stages in same litigation so that issue decided at earlier stage cannot be re-agitated at subsequent stage in same proceeding. The judgment relied on by the learned counsel for the petitioner has no application and, therefore, it is of no help to the petitioner for the reason that in the earlier proceedings under Section 125 of the Code, no such issue has been decided. It appears from the order EX.NA/2 dated 25-5-1988 that the trial Court, without deciding any issue, disposed of the application only on the statement of the parties that they have compromised the matter and, thus, the issue has not been decided.

Learned counsel for the non-petitioner submits that any agreement opposed to public policy cannot be enforced and

the non-petitioner cannot be precluded to claim the allowance of maintenance if by evidence she establishes that the petitioner despite having sufficient means, failed to maintain and neglected her, which, according to the learned counsel for the non-petitioner, has been established by her. He has relied on a decision of this Court in Lachhi Ram Vs. Smt. Shanta & Anr., S.B. Criminal Revision No. 334/2002 decided on 10-3-2004, wherein this Court held that "the agreement EX.P/1 does not speak of mutual divorce. There is no prohibition for claiming maintenance in future. The agreement EX.P/1 only speaks to the effect that the said amount is paid to her for maintenance of their child It is further stipulated that she will maintain the child and when he grows after five years, she will hand-over the child to her husband. Such an agreement is opposed to the public policy. There is statutory obligation on the petitioner to maintain his wife and minor child.

So far as payment of a sum of Rs.28,000/- by the petitioner to the non-petitioner is concerned, from the document EX.NA/4, it appears that earlier the proceedings were initiated by the non-petitioner against the petitioner and during pendency of that case, the parties compromised the matter and at that time a sum of Rs.28,000/- was paid by the petitioner to the non-petitioner and by compromise, the non-petitioner agreed that after having received Rs.28,000/-, nothing is outstanding from

the petitioner. Though it is stated that she would not claim the future maintenance, but from the writing of the document EX.NA/4, this expression is in continuation of the amount Rs.28,000/- received by the non-petitioner for the proceedings initiated by her under Section 125 of the Code. Even otherwise, such an agreement cannot be a prohibition for the non-petitioner to claim maintenance if she is otherwise unable to maintain her and the petitioner, despite having sufficient means, failed to maintain her.

So far as non-petitioner's working in “Aanganwadi” is concerned, the document shows that she has been paid Rs.563/- per month, though the non-petitioner came with the specific case that it is a casual appointment. The trial Court has taken note of it and considering that the non-petitioner is earning Rs.563/- per month, granted the monthly allowance of maintenance @ Rs.1000/-, which shows that the earning of the non-petitioner has been taken into consideration by the trial Court and, therefore, no further reduction in the monthly allowance of maintenance is warranted.

Learned counsel for the petitioner submits that subsequently the non-petitioner has been regularly selected and appointed in “Aanganwadi.” Be that as it may, there is nothing on record substantiating this contention raised by the learned counsel for the petitioner. If the non-petitioner has been

regularly appointed and her earning has been enhanced, it is always open for the petitioner to move before the trial Court under Section 127 of the Code seeping modification of the monthly allowance of maintenance.

In Jaipati Vs. Gian Chand, 2000 (3) Crimes 650, the Himachal Pradesh High Court, while examining the question on similar facts as to whether a wife, who has voluntarily surrendered her right to maintenance in divorce proceedings would not be entitled to claim subsequently maintenance allowance under Section 125 of the Code, relying on a Division Bench decision of Punjab & Haryana High Court in Ranjit Kaur Vs. Pavittar Singh, 1992 Cri.L.J. 262, held that any agreement between the parties surrendering the right to claim maintenance, is opposed to public policy and cannot be enforced. In Ranjit Kaur Vs. Pavittar Singh (supra), a Division Bench of Punjab & Haryana Court held that the jurisdiction of the Magistrate under Section 125 of the Code is not ousted by any agreement between the parties if the facts and circumstances of the case otherwise justify the grant of maintenance. It was further held that in every case the Magistrate is bound to examine whether there has been neglect or refusal on the part of the husband to maintain the wife. If the Magistrate finds that the wife is being so neglected or so refused to be maintained despite the agreement for grant of maintenance at a particular rate or

denying the same, he is duty bound to award appropriate maintenance under this section. The agreement pleaded being opposed to public policy and against the clear intendment of Section 125 of the Code, cannot be enforced or be a shield in a Court of law.

In Bai Tahira Vs. Ali Hussain Fissalli Chothia & Anr., AIR 1979 SC 362, the Hon'ble Supreme Court held that no settlement of claims which does not have the special statutory right of the divorce under Section 125 of the Code can operate to negate that claim.

Keeping in view the evidence on record, in my view, the non-petitioner has been able to establish that she is the legally wedded wife of the present petitioner and the petitioner, despite having sufficient means, failed to maintain and neglected her; the income of the petitioner has been established by reliable evidence which is evident from the record as well as from the order of the trial Court. Thus, keeping in view the decisions of the Hon'ble Supreme Court, the agreement, on which the petitioner relies, cannot be a ground and cannot operate as res judicata as there has not been any issue decided between the parties. Even from EX.NA/4, it is clear that if a sum of Rs.28,000/- has been received by the non-petitioner, it was with regard to the proceedings initiated earlier by her and on compromise the said amount was settled and received and,

therefore, it cannot be said that she has forgone her right to claim future maintenance.

In this view of the matter, I do not find any merit in the criminal revision and it is, therefore, dismissed.

(H.R. PANWAR), J.

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